

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ADRIANA ORNELAS, as)
Administrator of the Estate)
of RODOLFO ROMO, Deceased)
Plaintiff,) Case No.: 3:15-cv-00547-SMY-SCW
vs.)
THE UNITED STATES OF AMERICA,)
Defendant,)
TOTAL METAL RECYCLING,)
INC.)
Third-Party Defendant.)

**THIRD-PARTY DEFENDANT TOTAL METAL RECYCLING, INC.’S MOTION TO
DEFER RULING ON DEFENDANT UNITED STATES OF AMERICA’S MOTION TO
DISMISS CONTRACT CLAIMS PURSUANT TO RULE 12(b)(1)**

COMES NOW, Third-Party Defendant Total Metal Recycling, Inc. (“TMR”), by and through its attorneys, SmithAmundsen, LLC, and for its Motion to Defer Ruling on Defendant United States of America’s Motion to Dismiss Contract Claims Pursuant to Rule 12(b)(1), states as follows:

1. On August 20, 2015, Defendant United States of America filed its Cross-Complaint Against Co-Defendant TMR seeking declaratory judgment and contractual indemnification arising out of a Memorandum of Understanding (“MOU”) between USA and TMR. *See* Doc. No. 23. In addition, USA alleged contribution against TMR. *Id.*

2. On February 19, 2016, TMR filed its Counterclaim Directed Against the USA seeking declaratory judgment of the MOU, and alleging contractual indemnification, contribution, and negligence. *See* Doc. No. 43.

3. USA and TMR answered one another's Complaint, respectively. *See* Doc. Nos. 33; 48.

4. On June 23, 2016, Defendant USA filed its Motion to Dismiss Contract Claims Pursuant to Rule 12(b)(1) arguing that this Court does not have subject matter jurisdiction over any contract claims. *See* Doc. No. 52. TMR opposed the motion. *See* Doc. No. 57.

5. Even if the Court grants the USA's motion, TMR will remain a party entitled to a jury on the USA's contribution claim, while Plaintiff's Federal Tort Claims Act claim against the USA will be tried by the Court.

6. Throughout the pendency of this case, all parties have conducted exhaustive discovery. By the close of discovery in September, more than thirty depositions will have been taken from coast to coast. Plaintiff, TMR, and United States tax payers have expended significant resources in the prosecution and defense of these claims.

7. The parties should be given an opportunity to fully litigate and/or voluntarily settle the claims pending before this Court before they are dispatched in a piecemeal fashion. TMR intends to file a dispositive motion before the upcoming deadline which may allow the Court to address all outstanding claims between TMR and the USA.

8. Further, TMR understands Plaintiff's claim against the USA is not currently in a favorable settlement posture. It is TMR's position that a settlement conference involving only the USA and TMR may resolve all outstanding claims; however, if the contract claims between the USA and TMR are dismissed for want of subject matter jurisdiction and may be refiled in the Court of Claims, the possibility of global settlement is unlikely. In addition, allowing the USA and TMR every opportunity to resolve their respective claims may assist this Court by reducing

the complexity of a trial involving multiple parties trying claims to the Court or, in some cases, a jury.

WHEREFORE Third-Party Defendant Totall Metal Recycling, Inc. prays that this honorable Court defer ruling on USA's Motion to Dismiss Contract Claims Pursuant to Rule 12(b)(1) until such time that the parties have fully briefed and been heard on all dispositive issues, and for such further and other relief as the Court may find just and proper under the circumstances.

Respectfully submitted,

SMITHAMUNDSEN LLC

BY: /s/ W. Jeffrey Muskopf
W. Jeffrey Muskopf, #6244703
L. Dean Henke, #6311068
120 S. Central Ave., Ste. 700
St. Louis, MO 63105
(314) 719-3708
(314) 719-3709 fax
jmuskopf@salawus.com
[dhenke@salawus.com](mailto:henke@salawus.com)

Attorneys for Defendant Totall Metal Recycling, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was electronically filed and served upon all parties of record by the United States District Court's CM/ECF system on the 19th day of August 2016.

/s/ W. Jeffrey Muskopf